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IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA
NORTHERN DISTRICT OF THE STATE OF CALIFORNIA
SAN JOSE DIVISION

JIMMY D. HAWS, SETH DANIEL HAWS)
and MIA SKYE HAWS, minors, by and)
through their guardian ad litem, CARRIE A.)
HAWKS, and CARRIE A. HAWS, individually)

16 | Plaintiffs

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18 COUNTY OF MONTEREY, MICHAEL)
19 KANALAKIS, NATIVIDAD MEDICAL)
19 CENTER and DOES 1-300 inclusive)

20 Defendants

Case No. C 07-02599 JF

**PLAINTIFFS' SUPPLEMENTAL
MEMORANDUM OF POINTS AND
AUTHORITIES IN RE: MOTION TO
COMPEL ANSWERS TO
INTERROGATORIES AND
PRODUCTION OF DOCUMENTS**

**Magistrate
Judge:** Hon. Richard Seeborg

22 || L OVERVIEW

At hearing on March 26, 2008, Magistrate Seeborg ordered counsel to meet and confer further regarding the issues in dispute and proposed solution to remaining disputed issues.

On Wednesday, April 2, 2008, Ms. Kirkbride, Mr. Moore (via telephone), and Mr. Boroff met for over one hour. The meeting was quite fruitful and the parties believe most issues have been

Jimmy D. Haws, et al. v. County of Monterey, et al.
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TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS

1 resolved. They agreed to prepare a written memorialization of that resolution and do not believe
 2 further involvement of the court in those issues at this time is necessary.

3 Both counsel are withdrawing their request for sanctions in light of Magistrate Seeborg's
 4 comments at hearing coupled with the demonstrated cooperation.

5 County Counsel Kirkbride has agreed to stipulate to enlarge the number of depositions
 6 plaintiff may take from 10 to 30 without further petition. Plaintiff has agreed to the same number
 7 for defendant. Either side may request of each other or seek the Court's assistance in the event either
 8 the conduct of depositions is believed to have become oppressive or the agreed number insufficient.
 9 (The parties have developed much information in deposition discovery which has not been available
 10 in written discovery due to both the nature of the claim and records keeping practices of defendant
 11 County.)

12 As to some of the requests (e.g. architectural diagrams of the Monterey County Jail) the
 13 parties have agreed to provision of the writings and information upon plaintiff's agreement to
 14 protective order to be fashioned by the parties which will include (1) non-dissemination except to
 15 staff and consultants; (2) return of writings to defendant County upon completion of litigation; and
 16 (3) use of the discovery only in the course of this litigation.

17 **II. REMAINING ISSUES**

18 **A. Medical Records of Plaintiff Jimmy Haws and Roger Spencer**

19 These records are covered by Requests for Production of Documents Numbers 2 and 3 as
 20 found at page 6 of Plaintiffs' Rebuttal Brief.

21 Plaintiff detailed the relevancy of these records in his oral argument and Rebuttal Brief
 22 (p. 7:2-6). Haws came into the facility in October of 2005, admitting to a psychiatric history and
 23 currently under a regimen of psychotropic medications. When Spencer came in on September 23,
 24 2006, he also averred psychiatric history and anti-psychotic medication therapy. His intake
 25 classification officer records on that date "Spencer claims psychiatric problems. It seems that he is
 26 unable to care for himself until he takes his medication." After he assaulted plaintiff Jimmy Haws,

1 Spencer told authorities that his medication had been recently changed, he was unable to sleep for
 2 several nights, and he does not take the medication at pill pass, but instead after his one hour of yard
 3 outside of his shared cell each day. The assault upon Haws occurred during that one hour. Spencer's
 4 post assault behavior is suggestive of psychological disruption. (After his assault upon Haws, he
 5 was placed in a padded cell but continued to bang his head against the door until nine officers came
 6 in to restrain him to a chair. Under "normal" circumstances, only four officers are required for the
 7 task.)

8 Plaintiff believes these facts place the case squarely within *Redman v. County of San Diego*
 9 942 F2d 1435 (9th Cir. 1991) wherein a pre-trial detainee was placed in a cell with another inmate
 10 who was known to pose a high safety risk to his cell mates because of anti-social ideation and
 11 behavior (in that instance, sexual predation). The requested information may lead to the
 12 development of the identification of additional responsible parties, and thus defendants, as well.

13 Defendant failed to respond to the request in a timely manner and thus waived all objection
 14 to the production. *Rich Mark Corp. v. Timber Falling Consultants* 959 F2d 1468 at 1473 (9th Cir.
 15 1992). At hearing defendant posits that they have no objection to production of the records; they do
 16 not have them; their contractor, California Forensic Medical Group, does.

17 It is undisputed that CFMG¹ is the exclusive provider of medical services to inmates of the
 18 Monterey County Jail and does so under contract with the County. Under the terms of that contract,
 19 the records belong to the County of Monterey:

21 7. RECORDS

22 "Medical Records: Existing medical records and medical records
 23 prepared by CONTRACTOR shall be the property of the COUNTY
 24 and maintained by CONTRACTOR for the life of this contract.
 COUNTY shall be responsible for any destruction of any and all
 medical records. Upon termination of this contract such records will

26 ¹ California Forensic Medical Group

1 be turned over to the county of Monterey.”²
 2

3 Thus, County has the right of access to both Haws’ medical records and those of his assailant,
 4 Spencer. The right to obtain a document is sufficient dominion over it to constitute control over it
 5 and thus the ability and obligation to produce it. *In re Legato Systems Inc. Sec. Lit.* (NDCA2001)
 6 2004 FRD 167 at 170. A responding party is obliged to undertake reasonable inquiry to respond to
 7 a discovery request. FRCP Rule 33(a).

8 Plaintiff subpoenaed medical records from CFMG for plaintiff’s records on the date of the
 9 incident, but not his earlier records nor those of Mr. Spencer. Both have now been subpoenaed but
 10 plaintiff is not optimistic as to receipt of Mr. Spencer’s records. Plaintiff is agreeable to the records
 11 being produced under any protective order the Court believes appropriate.

12 **B. Staff Discipline and Training Records**

13 This subject is addressed by Request No. 28 which seeks “Any and all documents relating
 14 to the training and disciplinary records of the supervisory staff on duty and assigned to supervise
 15 inmates housed in D-Pod of the Monterey County Jail on the date of incident.”

16 In the April 2 meet and confer plaintiffs agreed to narrow this request to records of deputies
 17 assigned to floor or/and control duty on the date in question. (This narrows the request to no more
 18 than 5 to 8 people.) Plaintiff agrees to further narrow the nature of discipline and training records
 19 to disciplinary records relating to incidents of dishonest conduct, provocation of inmate on inmate
 20 or inmate on staff violence, misconduct related to pill pass or contraband violations, delay in
 21 response to emergency call or disturbances within the cell block, and failure to report observed
 22 inmate transgressions along with documentation of training remediation in the identified deficiency.

23 Defendant submitted an untimely response which waived all objection. (See Rutter *Federal*

25 ² County of Monterey, State of California Professional Services Agreement produced by
 26 County in response to discovery request.

1 *Civil Procedure Before Trial* ¶ 11:1905). Once the response was submitted, defendant posed
2 objection premised upon confidentiality and without provision of a Privilege Log. (Defense counsel
3 has indicated she intends to file a privilege log with her forthcoming brief.) The confidentiality
4 claim is apparently premised upon California state law.

5

6 **CONCLUSION:** The parties have sharply narrowed the issues before the Court. In fairness,
7 plaintiff does not believe this cooperative effort would have came about but for the Court's
8 intervention. Nonetheless, the parties are moving forward with some new understandings.

9 The medical record issue is particularly critical to plaintiff's case. Plaintiff has demonstrated
10 the sought records are highly relevant to the issues involved in the case and there is no effective
11 alternative means of their acquisition. For these reasons the Court is requested to Order production
12 of the documents identified in Request Nos. 2 and 3 and Request No. 28 as amended. The Court is
13 invited to fashion or direct counsel to fashion any protective order it considers appropriate to them.

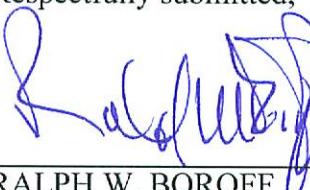
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Respectfully submitted,

16 Dated: April 4, 2008

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RALPH W. BOROFF

18 Attorney for Plaintiffs

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